

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY ALAN MEYERS,

Defendant-Appellant.

---

UNPUBLISHED

April 18, 2006

No. 259534

St. Clair Circuit Court

LC No. 03-002613-FC

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant Jeffery Alan Meyers appeals as of right from his conviction by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent sentences of 15 to 40 years' imprisonment for each conviction. We affirm. This case arises from allegations that defendant repeatedly sexually molested his daughter, who was then a minor.

Defendant argues on appeal that he was denied a fair trial by the improper introduction of other-acts evidence, including evidence that he used illegal drugs, evidence that he provided the complainant and other minors with alcohol and illegal drugs, and testimony from his ex-wife that in 1997 she discovered him masturbating and watching a pornographic film while the complainant slept next to him on the couch.

Because defendant failed to properly preserve these issues for appeal,<sup>1</sup> he must show that any error was plain and that it affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). MRE 404(b) governs the admission of other-bad-acts evidence. It provides, in part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

---

<sup>1</sup> Defendant did not object to the evidence on the grounds that it was improper bad-acts evidence.

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if (1) the evidence is offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) the evidence is relevant to an issue or fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). MRE 404(b)(1) is a rule of inclusion that includes a nonexclusive list of grounds on which evidence may be admitted. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). MRE 404(b)(1) permits the admission of relevant evidence on any ground that does not risk impermissible inferences of character to conduct. *Id.*; *VanderVliet*, *supra* at 65. Further, a court must determine "whether the probative value [of the evidence] is *substantially* outweighed by the risk of unfair prejudice." *Starr*, *supra* at 499 (emphasis in original).

Notwithstanding MRE 404(b), evidence of other criminal acts can be admissible if they constitute part of the *res gestae* of the charged offense, i.e., if "the act or conduct evidence being introduced [is] offered for the purpose of explaining the circumstances leading up to the charged offense and [is] not offered to prove that [the] defendant, by virtue of his commission of the separate act, had committed the offense for which he was on trial." *People v Bowers*, 136 Mich App 284, 294; 356 NW2d 618 (1984). Our Supreme Court has held:

"It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence. *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964); *People v Wardwell*, 167 Cal App 2d 566; 334 P2d 641 (1959); McCormick on Evidence (2d ed), § 190.

Stated differently:

'Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.' *State v Villavicencio*, *supra*, at 201." [*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Here, evidence that defendant provided alcohol to the complainant and others was necessary to present the complete story to the jury and explain the circumstances of the alleged sexual abuse. The victim testified that she was always under the influence of drugs or alcohol when defendant assaulted her and that this prohibited her from resisting defendant. Testimony that tended to show that defendant provided alcohol and illegal drugs to the complainant was a necessary link to her testimony that she was intoxicated

when defendant assaulted her. While much of the testimony regarding drug and alcohol use is not directly linked to a specific assault, the complainant testified that she was assaulted more than 30 times by defendant and that on every occasion she was drunk or “high.” Accordingly, evidence that defendant frequently gave marijuana or alcohol to the complainant explains the circumstances of defendant’s alleged ongoing sexual abuse. Without reference to these facts, the complainant’s accusations of sexual abuse would appear improbable. As stated in *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973), quoting *People v Jenness*, 5 Mich 305, 323 (1858):

“[W]here a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable; Such previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction – a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction.”

Moreover, the testimony that defendant used illegal drugs and provided other minors with alcohol and drugs is incidental to, and inseparable from, the highly probative testimony that defendant provided alcohol and drugs to the complainant. The prosecution did not present separate evidence that defendant provided alcohol to minors on occasions when the complainant was not involved. Accordingly, we conclude that the introduction of evidence that defendant provided alcohol and marijuana to the complainant and others and evidence that the defendant used drugs was proper and did not constitute plain error.

Defendant has abandoned on appeal the argument that his ex-wife’s testimony regarding the 1997 incident was improper other-acts evidence. Defendant has failed to offer any analysis regarding why this particular testimony did not fall within one of the recognized exceptions to MRE 404(b), fails to explain why the evidence was irrelevant, and fails to address why the evidence was substantially more prejudicial than probative. Accordingly, we conclude that the issue has been abandoned. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.”).

Next, defendant argues that the prosecutor committed misconduct by introducing the other-acts evidence discussed above and by failing to notify defendant before its introduction as required by MRE 404(b)(2).

Because defendant did not preserve the allegation of prosecutorial misconduct by objection below, review is for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court considers issues of prosecutorial misconduct “on a case-by-case

basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Ackerman*, 257 Mich App 434, 448, 669 NW2d 818 (2003). If the evidence at issue is relevant, no basis exists to conclude that the prosecutor offered the evidence in bad faith. *Id.*

The evidence that defendant provided the complainant and other minors with alcohol and illegal drugs and the evidence that defendant used illegal drugs was properly admitted without regard to MRE 404(b) as part of the res gestae of the offense. *Sholl, supra* at 740-742; *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). Accordingly, with regard to this evidence, there was no need to provide the notice required by MRE 404(b)(2). Moreover, because this evidence was properly admitted, defendant has failed to show bad faith constituting prosecutorial misconduct. *Ackerman, supra* at 448.

Next, assuming that the testimony of defendant's ex-wife regarding the 1997 incident is other-acts evidence under MRE 404(b), the prosecutor's failure to provide notice as required by MRE 404(b)(2) is plain error. *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001). However, defendant has simply failed to demonstrate how the absence of official notice under MRE 404(b)(2) altered the presentation of his defense at trial. Moreover, we find that the evidence at issue was offered for a proper purpose and was relevant to the complainant's credibility. See *People v Sabin*, 463 Mich 43, 69-70; 614 NW2d 888 (2000) ("[E]vidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant [is] admissible for the purpose of corroborating the complainant's testimony.") Additionally, defendant has not shown that the evidence was substantially more prejudicial than probative. This case does not invoke the "concern" underlying the notice requirement that "without notice, the prosecutor [is] able to use irrelevant, inadmissible prior bad acts evidence to secure [a defendant's] conviction." *Hawkins, supra* at 455. We conclude that the evidence was proper other-acts evidence and that the prosecutor's failure to provide notice did not affect defendant's substantial rights. Finally, because this evidence was relevant and not substantially more prejudicial than probative, defendant has failed to show that it was offered in bad faith; no prosecutorial misconduct requiring reversal occurred. *Ackerman, supra* at 448.

Lastly, defendant argues that trial counsel was ineffective for failing to object to the introduction of the other-acts evidence discussed above. Defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. See *id.* at 687-688 and *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). A defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Second, the defendant must show that counsel's performance so prejudiced him that he was deprived of a fair trial. See *Strickland, supra* at 687, and *Pickens, supra* at 309, 312-313. To establish prejudice, a defendant must show a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defense counsel's failure to object to evidence that defendant used illegal drugs and provided the victim and other minors with alcohol and illegal drugs was not objectively unreasonable because the evidence was proper res gestae evidence. Moreover, as noted above, evidence of the 1997 incident was also admissible. Counsel cannot be faulted for failing to make a meritless request. See *Hawkins, supra* at 457. We do conclude that it was objectively unreasonable for defense counsel to fail to argue that the 1997 incident was introduced without notice as required by MRE 404(b)(2). However, given the evidence offered against defendant and the totality of the circumstances in this case, we conclude that defendant has failed to show a reasonable probability that the outcome of the trial would have been different but for counsel's error in this regard.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Patrick M. Meter